

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01755-COA

**HOVAS CONSTRUCTION, INC., A MISSISSIPPI
CORPORATION**

APPELLANT

v.

**BOARD OF TRUSTEES OF WESTERN LINE
CONSOLIDATED SCHOOL DISTRICT**

APPELLEE

DATE OF JUDGMENT:	11/18/2010
TRIAL JUDGE:	HON. MARGARET CAREY-MCCRAY
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	NATHAN P. ADAMS JR. PHILIP MANSOUR JR.
ATTORNEY FOR APPELLEE:	DAVID S. ROUNSAVALL
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	\$19,500 IN LIQUIDATED DAMAGES AWARDED TO APPELLEE
DISPOSITION:	AFFIRMED - 09/04/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RUSSELL, J., FOR THE COURT:

¶1. Hovas Construction Inc. (Hovas) appeals the judgment of the Washington County Circuit Court awarding \$19,500 in liquidated damages to the Board of Trustees of Western Line Consolidated School District (School District) due to Hovas's failure to complete a construction project by the agreed-upon deadline. Hovas argues that the circuit court erred by: (1) finding the liquidated-damages provision of the contract enforceable when it was an unreasonable pre-estimation of damages, was generally unreasonable, and thus constituted a penalty; (2) holding that the School District had suffered actual damages; and (3) awarding

liquidated damages to the School District. We find no error and affirm the circuit court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2. Hovas and the Board of Trustees of Western Line Consolidated, a governmental entity located in Avon, Mississippi, entered into a construction contract on December 10, 2007. The contract was for the installation of gym windows, the renovation of existing restroom facilities, and an addition to a building at O'Bannon High School in Washington County, Mississippi. The contract price was \$450,000. The contract included a provision for substantial completion of the building no later than June 6, 2008. The final completion of the project was slated on or before July 6, 2008. The contract also included a provision for liquidated damages, which specified a rate of \$500 per day for each day the project went beyond the completion date.

¶3. Hovas began work on the school project and completed the replacement of windows with no problem. However, there was a glitch in the erection of the steel building. The parts for the steel building were placed on hold by Ruffin Building Systems and were not delivered to the job site until May 5, 2008. The steel building was erected on May 22, 2008. Other repairs such as the block work, brick work, and interior work for another building were completed on July 15, 2008. On July 15, 2008, the architect presented the School District with the notice of substantial completion, and the buildings were turned over to the School District. No notice of final completion of the project was submitted to the School District.

¶4. On June 12, 2008, the School District voted to enforce the liquidated damages provision of the contract because Hovas did not complete the project by the dates specified

in the contract.

¶5. The School District experienced various problems with the buildings. The plumbing in the restrooms that Hovas constructed became backed up, rendering the restrooms unusable. Hovas was called to fix the problems, but the problems were never fixed. The School District hired RH Plumbing to find and repair the plumbing problems. RH Plumbing determined that the sewer pipes were the source of the problems and completed repairs in July 2009. The School District was required to pay RH Plumbing \$9,872.45 for the plumbing work. Prior to the repairs, students of O'Bannon High School were also forced to leave the new buildings and go to other buildings to use the restrooms, causing disruptions to the school environment.

¶6. The School District paid Hovas all payments with the exception of \$21,750.76, which included \$19,500 withheld as liquidated damages. Hovas then filed an action seeking recovery of the \$19,500 withheld. The Circuit Court of Washington County found the liquidated damages provision of the contract reasonable and enforceable, and that the School District suffered actual damages. On November 8, 2010, the circuit court awarded the School District liquidated damages of \$19,500. Hovas timely appealed to this Court.

STANDARD OF REVIEW

¶7. “In bench trials, a circuit judge’s findings are subject to the same standard of review as those of a chancellor.” *Transocean Enterprise, Inc. v. Ingalls Shipbuilding, Inc.*, 33 So. 3d 459, 462 (¶7) (Miss. 2010) (quoting *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141, 145 (¶11) (Miss. 2007)). “Our familiar standard of review requires that when a trial judge sits without a jury, this Court will not disturb his factual determinations where there is

substantial evidence in the record to support those findings.” *Id.* (quoting *Ezell v. Williams*, 724 So. 2d 396, 397 (¶4) (Miss. 1998)). “This Court ought [to] and generally will affirm a trial court sitting without a jury on a question of fact unless, based upon substantial evidence, the court must be manifestly wrong.” *Id.* (quoting *Yarbrough v. Camphor*, 645 So. 2d 867, 869 (Miss. 1994)). “This Court, however, reviews questions of law de novo.” *Id.* (citing *Howard v. Estate of Harper ex rel. Harper*, 947 So. 2d 854, 856 (¶5) (Miss. 2006)).

DISCUSSION

I. Whether the circuit court erred in holding the liquidated-damages provision of the contract was reasonable, enforceable, and not a penalty.

¶8. Hovas argues that the circuit court erred when it found the liquidated-damages provision of the contract enforceable. Hovas argues that this provision is not a reasonable pre-estimation of the damages nor a reasonable estimate of actual damages that would be incurred by the School District upon late completion of the project. Hovas contends the provision is nothing more than a penalty.

¶9. It is undisputed that both parties were aware of the liquidated-damages provision in the contract. Liquidated-damages clauses are common in construction contracts. Typically the clauses set out the amount that the contractor will pay per day for not completing the project as set out in the contract. The purpose of a liquidated-damages clause is to affix actual damages flowing from a potential breach. *See PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 177 F.3d 351, 368 (5th Cir. 1999).

¶10. In this case, both parties consented to the liquidated-damages provision at the time the contract was made. According to Mississippi law, the intention of the parties will control to

determine whether a provision of a contract is for liquidated damages or for a penalty. *Cont'l Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 244 Miss. 465, 485, 142 So. 2d 200, 209 (1962).

¶11. “Equity will enforce a contract for liquidated damages if such liquidated damages can be found to be reasonable and proper in the light of the circumstances of the case.” *Maxey v. Glindmeyer*, 379 So. 2d 297, 301 (Miss. 1980). Often parties agree to the payment of liquidated damages in circumstances where it is difficult to predict actual damages that may result from a breach. *Brown v. Staple Cotton Coop. Ass’n*, 132 Miss. 859, 96 So. 849, 856-57 (1923). “[A]n agreement for liquidated damages will be held valid[] ‘in the absence of any evidence to show that the amount of damages claimed is unjust or oppressive, or that the amount claimed is disproportionate to the damages that would result from the breach or breaches of the several covenants of agreement.’” *Wood Naval Stores Export Ass’n v. Latimer*, 220 Miss. 652, 667, 71 So. 2d 425, 431 (1954) (quoting *Tobacco Growers' Coop. Ass’n v. Jones*, 117 S.E. 174, 183 (N.C. 1923)).

¶12. Hovas has offered no proof to show the amount provided for in the liquidated-damages provision of the contract was unjust or oppressive or that the amount claimed is disproportionate to the damages. Hovas only argues, without evidence, that there was no pre-estimation of damages by the School District to calculate the liquidated-damages amount. However, Mississippi law does not require such evidence of a pre-estimation, only that the amount be reasonable and proportionate.

¶13. The Restatement of Contracts (First) provides an illustration of this situation:

A contracts to build a grandstand for B at B's race course, for \$130,000, to

have it completed by a certain date, and to pay \$100 per day for every day's delay beyond that date in completing the stand. The sum promised for delay is liquidated damages and not a penalty. If completion is 10 days late, B's recoverable damages are \$1000. Evidence that B could not have used the grandstand for spectators during the period of delay is not sufficient to show that the delay caused no injury or that the harm is capable of accurate estimation.

¶14. In this case, Hovas and the School District contracted for Hovas to finish the project on a certain date. If the project was not completed by the agreed date, the School District could recover damages of \$500 per day. The trial court found the completion date for Hovas to be July 15, 2008, thirty-nine days after the substantial completion date of June 6, 2008, set by the contract. At the contractual rate of \$500 per day, the thirty-nine days of delay equals \$19,500 in liquidated damages. Hovas was aware of the liquidated-damages provision and what would happen if the project was not completed on time. Hovas agreed to the liquidated-damages provision, and the amount is not unreasonable or disproportionate to the total contract price of \$450,000. Thus, we find this issue to be without merit.

¶15. We also agree with the circuit court's finding that the general nature of the liquidated damages clearly supports the assessment in accordance with the terms of the contract. The amount of damages is reasonable and proportionate to the overall costs of the project and does not constitute a penalty. Thus, the circuit court did not err in awarding liquidated damages to the School District as argued by Hovas in their appeal.

II. Whether the circuit court erred in finding that the School District suffered actual damages.

¶16. Hovas next argues that the circuit court erred in finding that the School District suffered actual damages. However, the issue of actual damages does not have an impact on

the amount of the liquidated damages to which the School District is entitled. In fact, “parties [will] agree to the payment of liquidated damages where it is difficult to determine actual damages, resulting from a breach.” *Bd. of Trs. of State Insts. of Higher Learning v. Johnson*, 507 So. 2d 887, 890 (Miss. 1987). A liquidated-damages provision of a contract is present to account for actual damages that cannot be foreseen at the time of the making of the contract. A liquidated-damages provision will be enforceable unless: (1) “the actual damage resulting from the breach may be readily ascertained”; or (2) “the contract discloses no intention to fix the sum as liquidated damages or leaves the intention in this regard in doubt.” *PYCA*, 177 F.3d at 367. In this case, the damages that the School District would suffer if Hovas did not complete the project on time were not readily ascertainable. It is difficult to award nominal damages for things such as disruption of the school environment.

¶17. The liquidated damages were to compensate the School District for Hovas’s failure to comply with the contract and complete the project by the agreed-upon date. The circuit court never awarded any nominal damages for any actual damages the School District suffered. The circuit judge merely mentioned actual damages in support of its finding that the contracted amount for liquidated damages was a reasonable estimate of actual damages.

Finding no error, we affirm.

¶18. THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

LEE, C.J., IRVING, P.J., AND FAIR, J., CONCUR. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY ROBERTS AND FAIR, JJ. ROBERTS, J., CONCURS IN PART WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, ISHEE AND CARLTON, JJ.

MAXWELL, J., SPECIALLY CONCURRING:

¶19. I agree with Judge Russell’s affirmance of the trial judge’s award of liquidated damages but write separately to explain my reasoning.

¶20. This case turns on the enforceability of a liquidated-damages clause in a construction contract. The provision called for Hovas’s substantial completion of its construction work at the Western Line school by June 6, 2008. The parties agreed Hovas would be assessed \$500 for each calendar day beyond June 6 that substantial completion of the contract was delayed. Hovas did not meet the deadline. Rather, it presented notice of substantial completion to the School District on July 15, 2008—some thirty-nine days later.

¶21. Mississippi recognizes that parties to a contract may agree on the payment of liquidated damage where determination of actual damages would be difficult upon breach. *Brown v. Staple Cotton Coop. Assoc.*, 132 Miss 859, 892, 96 So. 849, 856-57 (1923). But when a contract’s terms impose a penalty for the purpose of “terrorizing” a party to comply with its terms, the penalty is not enforceable upon breach, either in equity or at law. *Shields v. Early*, 132 Miss. 282, 296, 95 So. 839, 841 (1923). “[T]he essence of liquidated damages is a genuine covenanted pre-estimate of damages.” *Id.* at 296-97, 95 So. at 841 (internal quotations omitted). “To distinguish then liquidated damages from a penalty, courts must look to the parties’ intentions.” *Bd. of Trs. of State Insts. of Higher Learning v. Johnson*, 507 So. 2d 887, 890 (Miss. 1987).

¶22. I respectfully disagree with Judge Griffis’s suggestion that Mississippi law required that the School District prove actual damages resulted from the breach to recover liquidated

damages.¹ While some courts utilize this back-end retrospective analysis to determine whether actual damages flow from the breach,² Mississippi does not. If Mississippi followed this approach, my analysis would indeed differ. But Mississippi apparently utilizes a prospective or front-end approach that instead focuses on the reasonableness of a liquidated-damages clause as of the time the contract was executed—not in hindsight. Indeed, the Mississippi Supreme Court has explained: “Whether a sum stipulated is a penalty or liquidated damages is a question of construction ‘to be decided upon the terms and inherent circumstances of each particular contract, *judged as at the time of the making of the contract, not as at the time of the breach.*’” *Shields*, 132 Miss. at 297, 94 So. at 841 (emphasis added).

¶23. Mississippi courts give special weight to two basic considerations when deciding whether a contractual provision provides for liquidated damages or an unenforceable penalty: (1) whether the stipulated damages are a reasonable pre-estimate of damages, and (2) whether at the time of the contract’s execution, it is difficult to determine actual damages

¹ However, I do agree with Judge Griffis that the subsequent problems and inconveniences the school district allegedly suffered relating to the bathrooms cannot and should not have been considered by the trial judge when determining the enforceability of the liquidated-damages provision. So to the extent the trial judge relied on these purported damages, it was improper to do so.

² In Virginia, “a liquidated damages clause will be construed as an unenforceable penalty . . . ‘where the stipulated amount would be grossly in excess of actual damages.’” *O’Brian v. Langley Sch.*, 507 S.E.2d 363, 365 (Va. 1998) (quoting *Brooks v. Bankson*, 445 S.E.2d 473, 479 (Va. 1994)). And in Texas, “[i]f the amount stipulated in the liquidated damages clause is ‘shown to be disproportionate to actual damages,’ [the court] should declare that the clause is a penalty and limit recovery to actual damages.” *SP Terrace, L.P. v. Meritage Homes of Texas, LLC*, 334 S.W.3d 275, 287 (Tex. Ct. App. 2010) (quoting *Johnson Eng’rs, Inc. v. Tri-Water Supply Corp.*, 582 S.W.2d 555, 557 (Tex. Ct. App. 1979)).

resulting from a breach. *Johnson*, 507 So. 2d at 890. “In Mississippi, where such damages for breach are both uncertain and difficult of estimation, such a provision has regularly been construed as one for liquidated damages.” *Id.* (internal quotations and citations omitted).

¶24. Here, Hovas’s breach is undisputed. So it reasons that, because both parties agreed to per diem damages upon breach, the burden of proving that the liquidated-damages clause is an unenforceable penalty falls on Hovas—the party challenging the provision. It is apparent that when forming the contract it was difficult if not impossible to determine the actual amount of damages that might result if the building was substantially delayed, or worse yet, not constructed before the school year began. And because the building was not intended to be rented or used for other commercial purposes, forecasting the probable or presumptive loss was much harder to estimate. However, it is reasonable to believe that the district and school, as well as its administrators, custodians, and teachers would undoubtedly suffer some loss in the event of default. Given the uncertainty of actual damages, the amount of \$500 per day on a \$450,000 contract, which was agreed upon by Hovas, does not strike me as an unreasonable anticipation of damages when viewed prospectively. *See id.* at 890. (finding liquidated-damages provision that varied based on the time remaining under a contract where prospective loss was difficult to assess was reasonable). Because Hovas has not proved the terms of the liquidation clause were unreasonable and thus amounted to a mere penalty, I would affirm the circuit judge’s award of liquidated damages.

ROBERTS AND FAIR, JJ., JOIN THIS OPINION.

GRIFFIS, P.J., DISSENTING:

¶25. This case requires the interpretation of a liquidated-damages clause in a construction

contract. The School District contends that because Hovas was thirty-nine days late in substantial completion, it was entitled to deduct \$19,500 as liquidated damages from the balance of the construction price due Hovas under the construction contract. Hovas argues that (1) any delay was not due to its fault, but was due to the late delivery of the steel building parts, the material having been timely ordered by Hovas; (2) the liquidated-damages provision in the contract is not a reasonable pre-estimation of damages, nor is it a reasonable estimate of actual damages determined by the School District that would be incurred by the School District upon late completion and, as a result, is nothing but a penalty provision in the contract; and (3) liquidated damages should not be assessed in a situation where the contractor's delay caused no actual damages to the School District.

¶26. The construction contract was for (1) the installation of gym windows, (2) the renovation of existing restroom facilities (which is referred to as the "500 building"), and (3) the construction of a new metal building (which is referred to as the "100 building").

Paragraph 3.3 of the contract provided:

The Contractor shall achieve Substantial Completion of the entire Work not later than One Hundred Eighty Days (180) from the date of commencement, or as follows:

The Contractor shall achieve Substantial Completion of the entire Work not later than June 6, 2008[,] with final completion being achieved on or before July 6, 2008[,] subject to the terms and conditions of the contract. For each calendar day thereafter that substantial completion of the contract is delayed, liquidated damages will be assessed as follows: Five Hundred Dollars (\$500.00) per calendar day. NO EXTENSIONS WILL BE ALLOWED.

The architect gave notice of substantial completion on July 15, 2008. Thus, the project was completed thirty-nine days after the required completion date. The School District withheld

payment of \$19,500 from the retainage. This suit seeks the recovery of this amount. We only consider the liquidated-damages clause.

¶27. There is no dispute that Hovas properly and timely replaced and installed the gym windows.

¶28. There appears to be no claim that Hovas was late in the completion of the work for the renovation of the existing restrooms in the 500 building. Instead, as a basis for actual damages, the School District only claims that Hovas's work on the restrooms was defective.

The School District claims only that:

Hovas' failure to properly renovate the restrooms in the 500 building caused disruptions during the school year as students had to leave the 500 building and go to other buildings on campus during the entire 2008-2009 school year for use of the restrooms. [The School District] incurred additional damages when it had to pay another contractor for remedial work performed on the plumbing Hovas never properly repaired.

The School District's claims here are not for late performance of the restroom renovation, under paragraph 3.3. The circuit judge found "[t]he delay also caused disruptions during the school year as students were unable to use restrooms in the renovated building. Students had to leave the building to go to other buildings to use the restroom." Thus, there is evidence that the School District was damaged due to the deficient or defective work of Hovas in the restroom-renovation project. Such damages, however, are not recoverable under paragraph 3.3 for late performance. There was simply no relation between the damages alleged from the defective restroom renovation and the liquidated-damages clause. Thus, I find no basis for the award of liquidated damages under paragraph 3.3 due to defective performance of the restroom renovation, and the remedy for defective performance is separate and distinct from

the remedy for late performance.

¶29. The only basis for liquidated damages resulted from Hovas' late completion of the 100 building. The School District argues that there was "no reason Hovas did not complete this project on time even with the delay in receiving the steel building from Ruffin [the supplier]." Hovas argues that the contract called for the construction of a pre-engineered, prefabricated metal special design steel building to house restrooms for men and women, a faculty lounge, and other things. The pre-engineered, prefabricated metal special design steel building was a special construction steel building that would require certain additional special features.

¶30. Ruffin Building Systems was the manufacturer and supplier of the pre-engineered, prefabricated metal building. Hovas ordered the building from Ruffin on December 20, 2007. On January 16, 2008, Ruffin advised Hovas of a revised contract amount and a change order. Ruffin also advised Hovas that the building was "placed on fabrication hold until signed change order is received by Ruffin." On February 4, 2008, Ruffin sent Hovas three copies of drawings of the project. On February 7, 2008, Hovas sent three sets of the Ruffin drawings to Charles Laney of JBHM Architects, for approval. On February 21, 2007, Hovas sent one set of drawings marked "Approved" and "Approved as Noted" to Ruffin. On February 28, 2008, Ruffin advised Hovas that the "hold" on the building was removed and delivery was scheduled for "05/05/08." The steel parts for the building were delivered to the job site on May 5, 2008. The steel building was erected on May 22, 2008. The interior of the steel building could not be completed until the building was received and erected.

¶31. The School District's fall semester began on August 4, 2008. Hovas argues that no

loss of use of the building was sustained by the School District. The school was not prevented from occupying the facility prior to the start of the school year.

¶32. Larry Green, the Superintendent of Western Line Consolidated School District, by deposition testified:

Q. . . . But your contention is that you got possession sometime in the first to middle of July, sometime in that time frame. Is that right?

A. That's correct.

Q. Okay. Now, school did not open until early August?

A. That's correct.

Q. All right. Did [the School District] suffer any actual damages as a result of the delay or not?

Counsel for [the School District]: Object to the question.

Q. I'm talking, did you have to pay any money out or anything like that as a result of that?

A. The part that you may be referring to that I'm hearing you from is the building being turned over to the district versus the beginning of the school year. Is that what you're coming at me with?

Q. No. I'm trying to find out – we're talking about liquidated damage provision here. But the school didn't actually suffer any out-of-pocket damages, did it.

Counsel for [the School District]: Same objection.

A. I don't know what you're referring to on "damages."

Q. Well, I'm talking about money.

A. The thing that has been troublesome with it is the fact that it wasn't completed on the substantial date of completion per the contract. Okay. Now, the preparation has to be done before the school year opens. I'm preparing right now for August. I can't wait until the week before. If

I do, I'm not ready. And my preparation starts many, many days before it. So the addition part, if you will, to the existing building, all the things had to be placed in there in preparation for the school to start. The restroom renovation in the 500 building, that had to be gotten ready for. And both areas there is new floor tile put down. That has got to be taken care of in preparation for school to start.

So all of that had to be done before, you know, the kids came in and the teachers came in. The restrooms in the 500 building have been a continual problem all year long after we took possession of the contractor's work. So those kind of things had to be done, not to say nothing about the grief it caused me. And I don't know if you can put a monetary figure on that amount or not. I do have a few gray hairs.

Mr. Green talked about the action necessary for the tile floor. Yet, the tile floor was completed by Hovas before the school year began.

¶33. In his book on Mississippi Construction Law, preeminent construction lawyer David

Mockbee succinctly stated the applicable law:

[A]ctual damage must be incurred by the owner for a liquidated[-] damage[s] provision to be enforceable. Mississippi courts will not enforce a liquidated [-]damage[s] provision where the assessment of liquidated damages constitutes a penalty, i.e., the liquidated damages assessed must bear some reasonable proportion to the loss actually suffered. *Ruckelshaus v. Broward County School Board*, 494 F.2d 1164 (5th Cir. 1974). The Court in *Board of Trustees v. Wood*, 779 F.2d 1106, 1107 (5th Cir. 1986) (quoting *Shields v. Early*, 132 Miss. 282, 95 So. 839 (1923)) stated that:

[t]he essence of a penalty is a payment of money stipulated as in terrorem of the party breaching the contract; while the essence of liquidated damages "is a genuine convenanted pre-estimate of damages."

See also Vanlandingham v. Jenkins, 43 So. 2d 378 (Miss. 1950).

For example, in *Massman Construction Co. v. City Council of Greenville, Mississippi*, 147 F.2d 925 (5th Cir. 1945) (footnotes omitted), the United States Court of Appeals for the Fifth Circuit, applying Mississippi law, held that liquidated damages would not be assessed in a situation where the contractor's delay caused no actual damages to the owner. In *Massman*,

Massman Construction Company contracted to work on the construction of a bridge over the Mississippi River at Greenville. The contract entered into by Massman specified liquidated damages for late completion. At the trial it was determined that in fact Massman had consumed 96 ½ days beyond the contract time to complete its work. In spite of this delay, however, it was shown that Massman's delay did not result in any delay as to the use of the bridge. Based upon these facts, the court held that since the City had suffered no actual damages, liquidated damages could not be enforced against the contractor. Specifically, the court stated:

Under all the facts and circumstances of this case, the enforcement of the provision in question [the liquidated-damages clause] would be inequitable and unreasonable, and would amount to the infliction of a penalty rather than the allowance of liquidated damages.

David Mockbee, *Mississippi Construction Law* 275 (2d ed. 2005).

¶34. The evidence indicated that the construction project was completed twenty days before the start of school. There were no actual damages sustained by the School District. The problems with the restrooms occurred after substantial completion, during the school year following the substantial completion. The damages referred to in the circuit judge's order occurred "during the school year" after substantial completion. Thus, such damages were not related to delay in the delivery of the building.

¶35. There was simply no evidence to support the circuit court's decision that Hovas' actions caused a delay in the beginning, opening, or operation of school; caused a loss of use of the building for school operations; or caused the School District to incur any out-of-pocket expenses from the delay. In *Massman*, Massman's delay did not result in any delay as to the use of the bridge. *Massman*, 147 F.2d at 927. *Massman* held that the City suffered no actual damages in use of the bridge. *Id.* Here, the School District received the construction project twenty days before the start of school. No actual damages were suffered. As such, the

liquidated-damages clause cannot be enforced.

¶36. I would reverse the judgment of the circuit court awarding to the Board of Trustees of Western Line Consolidated School District the sum of \$19,500 as liquidated damages and render an award in the sum of \$19,500 to Hovas against the Board of Trustees of Western Line Consolidated School District, as payment for the balance of the construction price due under the construction contract. Therefore, I respectfully dissent.

BARNES, ISHEE AND CARLTON, JJ., JOIN THIS OPINION.